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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 923

JANICE WIENER, as Executrix of the Estate of Norton Wiener, Deceased, and Related Cases,

Petitioners,

vs.

UNITED AIR LINES, INC.,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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JANICE WIENER, as Executrix of the Estate of Norton Wiener, Deceased, and Related Cases,

Petitioners,

vs.

UNITED AIR LINES, INC.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The judgment reversed an order of the United States District Court for the Southern District of California which had consolidated for trial, on the issue of liability only, twenty-three actions for wrongful death arising from a common air disaster.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported. It is set forth as Appendix A to this petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 16, 1961. Petitioners filed a timely petition for rehearing on February 8, 1961. The petition for rehearing was denied by the Court of Appeals on February 15, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented.

Whether a U. S. District Court has the discretion under Rule 42 of the Federal Rules of Civil Procedure to consolidate actions for wrongful death arising out of a common air disaster on the issue of liability only, where compensatory but not exemplary damages are sought by the plaintiffs.

Federal Rule Involved.

Rule 42 of the Federal Rules of Civil Procedure provides:

> *"Consolidated; separate trials.—(a) Consolidation.*
>
> "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
>
> "(b) *Separate trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

Statement.

On April 21, 1958, near Las Vegas, Nevada, a United Air Lines DC-7 collided in mid-air with an F-100F military jet owned by the United States and operated by Air Force personnel. All persons in both airplanes were killed. [R. 292-302.]

Twenty-three separate actions for wrongful death were filed in the United States District Court for the Southern District of California, Central Division, by heirs or personal representatives of persons aboard the United Air Lines plane. In all cases United Air Lines, Inc., (hereinafter referred to as United) and the United States were joined as defendants. [R. 7-291.] Jurisdiction against United is based upon diversity of citizenship, 28 U. S. C. §1332, and against the United States upon the Federal Tort Claims Act, 28 U. S. C. §1346(b).

In each of the twenty-three cases United filed an answer and a demand for jury trial. [R. 7-291.] The claims against the United States are, under the Tort Claims Act, triable to the court. 28 U. S. C. §2402. After all the cases were at issue and upon motion of the United States, District Judge Peirson M. Hall, exercising his discretion under Rule 42, signed an order in all twenty-three cases which provided *inter alia* as follows:

> "(1) That all of the above entitled cases be consolidated on the issue of liability only. . . .
>
> "(2) That all of the above entitled cases, so consolidated, shall be jointly tried in a separate trial as to liability only, and

"(3) That the question of damages, if any, as to the plaintiffs in each of the above-entitled cases shall be tried separately, by separate juries where demanded, unless waived, unless one or more of said plaintiffs consent to a consolidation for trial on that issue, . . ." [R. 368-377.]

At United's request, the district court included in the order the following statement:

". . . the court is of the opinion that this Order involves a controlling question of law, as defined in 28 U. S. C. A. 1292(b), as to which there is a substantial ground for differences of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of the litigation." [R. 377.]

After obtaining permission from the court of appeals as required by 28 U. S. C. §1292(b) [R. 388], United appealed the order of consolidation. [R. 378.] The court of appeals ordered that the appeals in all of the cases be consolidated. [R. 389.]

United opposed the consolidation by the trial court only because it provided for separate jury trials on the issue of damages. [R. 341-348, 352.]

In its brief to the court of appeals, United contended, among other things, that the plaintiffs were either demanding or were in a position to demand exemplary damages, and that the issues of liability and damages were so interrelated as to require that a single jury hear the evidence on both issues. However, in their brief to

the court of appeals, the petitioners stated (p. 15 fn. 8) that many of them "would be willing to waive their claims for exemplary damages. . . ."[1]

The opinion of the court (Appx. A) discusses primarily the problems created by claims for exemplary damages and then concludes: "We do hold that under the circumstances presented by this appeal the issues of liability and damages, exemplary *or normal,* are not so distinct and separable that a separate trial of the damage issues may be had without injustice." (Emphasis added.)[2]

In the petition for rehearing filed by petitioners herein the court was advised (p. 2) that all claims for exemplary or punitive damages were being disavowed by all of the petitioners in all twenty-three cases and asked for specific consideration of the issue of separate trials on liability and on "normal" damages. The reply of

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[1]The full text reads as follows:

"Although it is the position of appellees that the court order should be affirmed in its present form, many of the appellees have indicated that they have no present intentions of claiming exemplary damages and that they would be willing to waive their claims for exemplary damages as a condition of approval of the court's order if that be necessary. In making this statement appellees wish to make it clear that they have no intention of retreating from their position that as a matter of law the order of the court below should be sustained as is."

[2]Nowhere does the court in its opinion point out any "circumstances" which tend to merge the issues of compensatory damages and liability in such a way as to render separate trials on these two issues unjust.

United pointed to the court's reference in its opinion to "normal" damages in the language cited above. The petition for rehearing was denied, without opinion.

Since then each of the petitioners has filed in the district court a "Statement Re Limitation of Claim for Damages" stating as to each petitioner that he ". . . hereby limits his claim for damages in the above entitled matter to pecuniary damages, general and special. Plaintiff makes no claim for exemplary or punitive damages."[3]

Accordingly, the issue as it relates to exemplary damages is not here involved; the sole question presented by this petition is whether a district court in the exercise of its discretion may consolidate on the issue of liability cases seeking only compensatory damages for wrongful death, leaving the issue of damages to be tried separately in each case.

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[3]The clerk of the district court is being requested to forward for the record herein certified copies of said statements.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Has Decided an Important Question of Federal Procedure in a Way in Conflict With the Applicable Decision of This Court.

The decision of the court of appeals that the issue of liability cannot be separate from the issue of compensatory damages in these wrongful death actions is in conflict with this Court's decision in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 495. In the *Gasoline Products* case, this Court held that the Seventh Amendment's guarantee of a right to a trial by jury does not "exact the retention of old forms of procedure" and accordingly, does not require all issues in a civil case to be tried before the same jury.[4] If the issues are "clearly separable," the Court said, they may be tried separately. *Id.* at 499. If, however, the issues are so interwoven that one cannot be submitted to the jury independently of the other "without confusion and uncertainty, which would amount to a denial of a fair trial," the issues must be tried together. *Id.* at 500.

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[4]See also, *Baltimore & Carolina v. Redman*, 295 U. S. 654, 657; *Galloway v. United States*, 319 U. S. 372, 390; *United States v. Wood*, 299 U. S. 123, 143; *Duffin v. Lucas*, 55 F. 2d 786, 799; *Dextone Co. v. Building Trades Council*, 60 F. 2d 47; *May Department Stores Co. v. Bell*, 61 F. 2d 830, 842; *Yellow Cab Co. v. Keane*, 93 F. 2d 290, 291; *Thompson v. Camp*, 167 F. 2d 733, 734; *Washington Gas Light Co. v. Connelly*, 214 F. 2d 254, 256; *Byrne v. Matczak*, 254 F. 2d 525, 528, and 529; *Cleary v. Indiana Beach, Inc.*, 275 F. 2d 543, 545.

The question of United's liability for the death of petitioners' decedents will turn on evidence, much of it highly technical, pertaining to the circumstances surrounding the collision. None of this evidence will relate in any way to the issue of the amount of damages suffered by the widow and children of a victim of the accident. The issues are totally unrelated. *Cf., Massackusetts Bonding & Insurance Company v. United States,* 352 U. S. 128, 132-3.

Petitioners submit that the decision below conflicts with the *Gasoline Products* case because the issues of liability and normal compensatory damages in these wrongful death cases are "clearly separable." The opinion of the court of appeals sets forth no circumstances—indeed there are none—suggesting that the trial judge's ruling, made in the exercise of his discretion, that separate trials can fairly be had on the issues of liability and compensatory damages is erroneous.

The court of appeals in its opinion below concerned itself almost exclusively with the separability of the issues of liability and exemplary damages. That question as pointed out above is not involved in this case. The only question here is whether the issue of liability may be tried before one jury and the amount of compensatory damages (to which issue the degree of United's culpability is immaterial) determined by another.

Petitioners submit that the court of appeals is in clear error on the separability of the issues of liability and normal compensatory damages.

II.

The Court of Appeals Has Rendered a Decision in Conflict With the Decision of Another Court of Appeals on the Same Matter.

The decision of the court of appeals below, that the issue of liability cannot be tried separately from the issue of damages, conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Nettles v. General Accident F. & L. Ins. Co.*, 234 F. 2d 243. The *Nettles* case involved three separate suits for personal injuries sustained in the same automobile accident. The court of appeals held that the trial court did not err in trying the issue of liability separately from the issue of damages.[5]

III.

The Court of Appeals' Decision Seriously and Erroneously Restricts a Proper Exercise of Discretion by the Trial Court; if Allowed to Stand, It Would Be Unfair to Petitioners and It Would Place Such a Heavy Burden on the District Court as to Call for an Exercise of This Court's Power of Supervision.

The trend of modern aviation toward larger and faster aircraft carries with it a modern species of civil litigation. Commercial air disasters, when they occur, usually give rise to civil actions with two distinguishing characteristics:

(1) Since most or all of the persons aboard are killed instantly, a large number of actions for wrong-

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[5]Also see *Rickenbacher Transp. Co. v. Pennsylvania R. Co.*, 7 Fed. Rules Serv. 42b.12, case 1, in which the United States District Court for the Southern District of New York ordered the issue of liability determined and tried before the issue of damages in a truck and train collision case.

ful death arise out of identical facts on the issue of liability; and

(2) The issue of liability involves complex technical issues of fact as to the cause of the accident. It is estimated by experienced trial counsel that in the instant cases the trial on the issue of liability alone will take approximately three months.* Depositions of 34 persons have already been taken, most of them experts on technical aspects of aviation as related to the cause of the mid-air collision between the United DC-7 and the military jet. The deposition transcripts already taken total over 3,600 pages cumulatively.

It is important to the administration of justice in the United States District Courts to establish a fair and efficient procedure for handling litigation arising out of major air disasters. Because of the interstate pattern of commercial aviation, such cases can be expected to have the necessary diversity of citizenship for jurisdiction in the federal district courts. Significantly, all 23 cases involved in this petition have federal jurisdiction based upon diversity of citizenship as to defendant United Air Lines.

Petitioners submit that the district court's order of consolidation on the issue of liability offers the method of trying this complex litigation that is both fair to the parties and not unduly burdensome to the district

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*The Chief Asst. U. S. Attorney in Los Angeles who has been representing the United States in these wrongful death actions has estimated that the trial on the issue of liability alone will take approximately 3 months. See Affidavit of Max F. Deutz transmitted to the Clerk of the United States Supreme Court together with this petition. Petitioners concur in this estimate.

court.[7] Significantly, the order of consolidation was made by the judicial officer having the primary responsibility for the trial as well as the most intimate knowledge of the problems involved.

One point stands out above all others. To try and retry the issue of liability over and over before different juries has nothing to recommend it from the standpoint of the administration of justice. Duplicating the trial on the facts of this mid-air collision, with all its technical ramifications, would impose an unreasonable and unnecessary burden on the court and the parties.

One way to avoid trying the issue of liability repeatedly would be to try before a single jury all 23 cases on both liability and damages. This alternative, which was rejected by the district court [R. 341-348, 352], has many disadvantages. Among them are:

(1) The burden upon a single jury would indeed be a heavy one. The trial on the issue of liability, with all its technical aspects, will require a jury with a high degree of comprehension. To add to this without interruption or break twenty-three individual trials on the issue of damages may increase the initial burden to the breaking point. The task of getting competent jurors to devote the required amount of continuous time may well prove insuperable.

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[7]Note that the procedure of a single trial on liability, the result of which is binding in all cases, was used by agreement of the parties in the *Eastern Air Lines* cases that were before this Court in the 1955 Term. See *Eastern Air Lines v. Union Trust Co.*, 221 F. 2d 62, aff'd in part and rev'd in part, 350 U. S. 907.

(2) If a single jury is used, a department of the district court may be tied up for as long as three to five months without interruption, which could play havoc with the rest of the court's calendar.

(3) If there is a separate trial on the issue of liability, as ordered by the district court below, a break of, say, 60 to 120 days could follow the trial on liability. Such a break would serve two purposes: (a) Give the court a chance to handle other matters on its calendar, and (b) Give the parties an opportunity to consider and discuss settlement if plaintiffs prevail on the liability issue. It is reasonable to assume that all or a large number of the cases would be settled without a trial on damages if the parties have time to negotiate following a plaintiffs' verdict.

(4) A jury trying twenty-three separate damage cases—following a long involved trial on liability—would inevitably become confused as one set of facts on damages is piled upon another. It is likely that, from exhaustion, confusion or boredom, the jury would begin assessing damages automatically and mechanically without giving each case its proper consideration. Moreover, a jury of twelve average citizens very well might be influenced toward reducing each verdict as the jurors became conscious that their total awards climbed into million dollar figures. In short, it would be prejudicial to the plaintiffs to have a single jury try all twenty-three of their cases on the issue of damages.

(5) The problem of selecting a jury to handle twenty-three separate cases of damages is far different from the problem of selecting a jury to consider the single issue of liability. The reasons why counsel would want to challenge jurors, either for cause or peremptorily, differ from case to case.

By contrast with the procedure for a single jury for all issues, a single trial on liability and separate trials on damages would combine fairness to the parties with a minimum of burden on the district court. United Air Lines could not be prejudiced if a jury assesses damages without evidence before it on the issue of liability. Liability and compensatory damages are unrelated issues. Indeed, it would be improper for a jury to consider the degree of United's culpability in fixing damages.

Professor Moore argues in favor of the procedure which the district court wanted to follow below:

> "A separate trial may, of course, be granted as to a particular issue, where appropriate, even though it does not amount to a 'claim' or 'defense'. A separate trial may properly be ordered on the issue of the defendant's liability to respond in damages, particularly where plaintiff's proof of damages would involve the testimony of a large number of persons. (Footnote omitted.) This procedure has been privately recommended by a number of members of the judiciary as a means of expediting trials and of saving time and expense.

> We have found no reason why this procedure, which is authorized by Rule 42b should not be more extensively employed."
>
> 5 Moore's Federal Practice (2d Ed.), p. 1217.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX "A".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United Air Lines, Inc., Appellant, vs. Janice Wiener, as Executrix of the Estate of Norton Wiener, Deceased, and Related Cases, Appellees. No. 16,860. Jan. 16, 1961.

Appeal from the United States District Court for the Southern District of California, Central Division, Pursuan to 28 U. S. C. 1292(b).

Before: Hamlin and Jertberg, Circuit Judges, and Walsh, District Judge.

Hamlin, Circuit Judge.

On April 21, 1958, near Las Vegas, Nevada, there was a mid-air collision between an airplane owned and operated by the United States of America and a passenger plane owned and operated by United Airlines, herein referred to as United. All persons in each airplane were killed in the collision. Twenty-three actions for damages against United and the United States were filed in the United States District Court for the Southern District of California, Central Division, by the heirs or personal representatives of the persons killed in the collision.

After the twenty-three cases were at issue, the United States made a motion in the district court asking that all cases be consolidated on the issue of liability only. At a hearing upon this motion United indicated that it did not object to consolidation on the issue of liability,

as long as this consolidation did not mean that the issue of damages would be tried before a different jury in the event that United was found to be liable. An order was submitted by the United States providing for the consolidation, but this proposed order was silent concerning whether the same jury would determine the issue of damages if that issue should be reached. United then filed its own motion, asking that in the event the cases were consolidated for any purpose they be consolidated for trial on all issues before the same jury. After a further hearing the district court signed an order which provided *inter alia* as follows:

> (1) That all of the above-entitled cases be consolidated on the issue of liability only, . . .
>
> (2) That all of the above-entitled cases, so consolidated, shall be jointly tried in a separate trial as to liability only, and
>
> (3) That the question of damages, if any, as to the plaintiffs in each of the above-entitled cases shall be tried separately, by separate juries where demanded, unless waived, unless one or more of said plaintiffs consent to a consolidation for trial on that issue, . . .

Included in the court's order was the following statement:

> ". . . the court is of the opinion that this Order involves a controlling question of law, as defined in 28 U. S. C. A. 1292(b), as to which there is a substantial ground for differences of opinion, and that an immediate appeal from this order may materially advance the ultimate termination of the litigation."

After obtaining permission to do so, United timely appealed to this court from the above order.

Jurisdiction in the district court against United is based upon diversity of citizenship, 28 U. S. C. A. §1332, and against the United States of America upon the Federal Tort Claims Act, 28 U. S. C. A. §1346(b). Jurisdiction in this court is based upon 28 U. S. C. A. §1292(b).

The appellees contend that the order of the district court is proper under rule 42(b) of the Fed. Rules Civ. Proc. which reads as follows:

> "(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

The appellant points out that there are no express words in this rule permitting separate trials before separate juries on separate issues, and asserts that the procedure the rule contemplates is the completion of the trial upon a particular issue prior to the trial of another issue by the same trier of fact. It then contends that if the rule is given the interpretation advocated by the appellees, it is violative of the Seventh Amendment to the Constitution of the United States.[1] Appellant contends that the right to a trial by jury as guaranteed by the Seventh Amendment has been held to mean "the

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[1] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

right to trial by jury as it existed by common law at the time of the adoption of the Seventh Amendment" and cites Dimick v. Schiedt, 293 U. S. 474 (1935), as authority for its position. It asserts that the procedure of having trials of separate issues in the same case by separate juries was not known to the common law.

We have been cited no case by either appellant or appellees which either approves or disapproves the exact procedure provided for in the order of the district court. Each party refers to Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U. S. 494 (1931), contending that either the language or the holding of that case lends support to his contention. In that case, after a trial in the district court of a contract action, the Court of Appeals for the First Circuit reversed the judgment because of errors in the charge of the trial court with respect to the measure of damages on the counterclaim. But in reversing, the court restricted the new trial to the determination of damages only. The Supreme Court granted certiorari to review the single question of whether the court of appeals erred in thus limiting the new trial. The Court discussed the provisions of the Seventh Amendment and stated:

> "It is true that at common law there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all."[2]

After discussing modification of this rule in certain states, the Court said:

> "Lord Mansfield, in applying the common law rule where the verdict, correct as to one issue,

[2] 283 U.S. at 497.

was erroneous as to another, said: '. . . for form's sake, we must set aside the whole verdict . . .' Edie v. East India Co., 1 W.Bl. 295, 298. But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. See Herron v. Southern Pacific Co., ante, p. 91. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. See Walker v. Southern Pacific R. Co., 165 U. S. 593, 596. It does not prohibit the introduction of new methods for ascertaining what facts are in issue, see *Ex parte* Peterson, 253 U. S. 300, 309, or require that an issue once correctly determined, in accordance with the constitutional command, be tried a second time, even though justice demands that another distinct issue, because erroneously determined, must again be passed on by a jury."[3]

* * * * *

"Here we hold that where the requirement of a jury trial has been satisfied by verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."[4]

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[3]283 U.S. at 498.
[4]Id. at 499.

The court, however, then went on to consider the facts of the particular case, and stated:

> "But the question remains whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried. The verdict on the counterclaim may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material, since it will be open to petitioner to insist upon the duty of respondent to minimize the damages."[5]
>
> * * * * *
>
> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial. There should be a new trial of all the issues raised by the counterclaim." [Citations omitted.][6]

A consideration of the issues in the instant cases reveals a similar situation. An examination of the claims made in each of the twenty-three complaints shows the

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[5]Ibid.

[6]Id. at 500.

following facts. Each complaint alleges that both United and the United States of America were negligent. In five of the cases United is charged with recklessness in addition to the usual charge of negligence and carelessness. In three of the cases the plaintiffs demand exemplary damages. In eight of the cases sections of the Nevada Revised Statutes that provide for exemplary damages are set out in the complaints. All of the other cases refer to one or the other of the Nevada statutes which have the exemplary damage provisions. In each of the answers filed by United the ownership and operation of the plane and the collision and the death of the decedent in question is admitted. In all except one it was admitted that the decedent was a passenger for hire. All denied the allegations of negligence, carelessness, recklessness, wantonness, or willfulness.[7]

It is apparent that where parties are asking for exemplary damages which depend upon the degree of culpability of the defendant, they are required to establish by their evidence their contentions as to the degree of negligence. Likewise, the defendant is entitled to show all of the facts surrounding the collision in order to establish, if he can, first, that there was no negligence and second, that even if there was negligence there was no willfulness or wantonness or extreme recklessness.

We do not say that in no circumstances can a separate jury determine the issue of damages after another

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[7]In one action where there is a mere allegation of negligence counsel apparently believes that exemplary damages may be recovered because they are demanded in the prayer without any allegation as to United's conduct other than negligence and carelessness.

jury has determined the issue of liability, for we do not reach that question in this case. As was said in a recent case from the seventh Circuit, "Whether a party is deprived of a jury trial as contemplated by the Seventh Amendment when some of the issues are submitted to one jury and other issues to a second jury, is a more difficult question to resolve." Hosie v. Chicago & Northwestern Ry., 282 F. 2d 639, 642 (7 Cir. 1960). We do hold that under the circumstances presented by this appeal the issues of liability and damages, exemplary or normal, are not so distinct and separable that a separate trial of the damage issues my be had without injustice. The question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial. Gasoline Products Co., Inc. v. Champlin Co., *supra*.

The order of the district court is reversed.

(Endorsed) Opinion Filed Jan. 16, 1961.

Frank H. Schmid, Clerk.

State of California—ss.
County of Los Angeles.

Max F. Deutz, being first duly sworn, deposes and says:

That he is Chief Assistant U. S. Attorney for the Southern District of California and has been designated as Chief Trial Counsel in the Las Vegas Plane Crash Litigation, including the case of Janice Wiener, et al. v United States, et al., Civil No. 469-58 PH.

That he is thoroughly familiar with the nature of this litigation and has been the primary participant in the depositions taken in these cases;

That there are approximately 3,600 pages of deposition transcript, most of which it is anticipated will be read into the record at the time of trial;

That it is this affiant's best estimate that, considering the amount of depositions to be used at trial and the fact that additional fact and expert witnesses will be called to testify, it will require approximately three months of trial time to complete the trial on the issues of liability alone.

MAX F. DEUTZ.

Sworn to and subscribed before me this 24th day of March, 1961.

LOIS M. PARKINSON,
Notary Public in and for said County and State.

My Commission expires Feb. 24, 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 923

JANICE WIENER, as Executrix of the Estate of Norton Wiener, Deceased, and related cases,

Petitioners,

vs.

UNITED AIR LINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit is now reported in 286 F. 2d 302. It is also correctly set forth as appendix "A" to the Petition for Certiorari.

Jurisdiction.

The jurisdictional requisites are correctly set forth in the Petition.

Question Presented.

Whether under the particular facts of these twenty-three consolidated actions and under the circumstances presented by the record, a separate trial on the issue of damages should be had before a new jury, different from the one which will try the consolidated actions on the issue of liability.

Federal Rule Involved.

The Petition correctly states that this matter involves Rule 42 of the Federal Rules of Civil Procedure, which rule is correctly set forth in the Petition.

Statement.

Petitioners' statement of the case is correct with the following reservations:

(1) The Petition states that it was at United's request that the District Court included in its Order consolidating the twenty-three cases on liability only, the certification that in its opinion the order involved a controlling question of law as to which there was a substantial ground for differences of opinion. This statement was made by petitioners under a mistake as to the facts and we are authorized by counsel of Petitioners to state that actually the matter was inserted in the District Court's Order without any suggestion by either party.

(2) The inference may be drawn from Petitioners' statement of the case that United opposed consolidation of the cases on the issue of liability. The record shows that United never opposed consolidation on the issue of liability and objected only to the trial of the damage issue before new juries. [R. 352-353, 364-368, Appellant's Opening Brief in the Court of Appeals for the Ninth Circuit (pp. 11-12).]

United's position has been throughout that it would be a complete waste of time to try these cases separately on the issue of liability and that there should be a consolidation on that issue, but that thereafter the jury should be retained to assess the damages in these cases, one by one, or in such groups of cases as may conveniently be tried together. Appendix "A" to this brief contains a portion of our brief before the Court of Appeals in which we stated our position, a position to which we still adhere.

(3) For reasons explained below in Respondent's argument, Respondent does not accept it as an accomplished fact that by filing "limitations" of their claims in the District Court after the decision of the Court of Appeals became final, Petitioners have effectively eliminated all claims for exemplary or punitive damages.

ARGUMENT.

I.

The Question Presented by Petitioners Is Not Involved in This Case.

Petitioners state that the question presented is the existence of a discretion in the District Court to consolidate actions for wrongful death arising out of a common disaster, where compensatory but not exemplary damages are sought.

This statement is erroneous for at least three reasons:

(1) First and foremost, the Court of Appeals expressly held that it did not and would not pass on the general question of whether such a power existed in the District Court. So that there can be no question on that score, we quote from the opinion:

> "We do not say that in no circumstances can a separate jury determine the issue of damages after another jury has determined the issue of liability, for we do not reach that question in this case. As was said in a recent case from the Seventh Circuit, 'Whether a party is deprived of a jury trial as contemplated by the Seventh Amendment when some of the issues are submitted to one jury and other issues to a second jury, is a more difficult question to resolve.' *Hosie v. Chicago & Northwestern Ry.*, 7 Cir., 1960, 282 F. 2d 639, 642. We do hold that under the circumstances presented by this appeal the issues of liability and damages, exemplary *or normal*, are not so distinct and separable that a separate trial of the damage issues may be had without injustice. The question of damages is so interwoven with that of liability that

the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial. *Gasoline Product Co. Inc. v. Champlin Co., supra.*" (Emphasis added.)

United Airlines Inc. v. Wiener, 9 Cir., 1960, 286 F. 2d 302, 306.

It is difficult to see how, in view of the express holding by the Court of Appeals that it was not necessary to rule on the broad question presented by Petitioners, it can now be argued that anything but the narrow facts of this particular case are before the Court.

(2) Further Petitioners assert that the question presented involves the exercise of discretion in ordering separate juries to pass on liability and damages where only compensatory damages are involved. While we do not concede the legal effectiveness of the so-called "Statements Re Limitation of Claims for Damages" which Petitioners have filed since the Court of Appeals denied a rehearing, we must point out that Petitioners are attempting to present this question to this Court in a posture in which it was never presented to the Courts below.

(3) Finally, we cannot agree that even now the exemplary damages have been effectively waived. In three of the cases [*Emanuel* R. 31, *Aaronson* R. 180 and *Bailey* R. 240] all plaintiffs but one are minors, represented by guardians *ad litem*. Nothing is shown to indicate that these waivers have been approved by any court.

In *Berry v. Chaplin*, 74 Cal. App. 2d 652, 169 P. 2d 442, a stipulation of the guardian *ad litem* which was approved by the trial court was held not to be binding on the minor plaintiff, because the court had not taken any evidence on it.

> "The guardian *ad litem* can neither admit anything against nor waive anything in favor of his ward, but the adversary of the infant must be required to prove his whole case." (*Ibid.* p. 658.)

In fifteen cases* the plaintiffs are personal representatives. All except *Lipson* are appointed by California courts. California Probate Code, Section 578(a), set forth in Appendix B provides for the settlement of "all claims or rights of action" given by any law with the approval of the appointing court. No such approval has ever been obtained as far as the record shows or as far as we know.

II.

The Opinion of the Court of Appeals Does Not Conflict With Any Applicable Decision of This Court.

Petitioners claim that the opinion of the Court of Appeals is in conflict with *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494.

In that case this Court said that it was not a violation of the right to a trial by jury under the Seventh Amendment to grant a new trial on the issue of dam-

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*Wiener [R. 16], *Laraia* [R. 52], *Simons* [R. 75], *Kean* [R. 81], *McKinney* [R. 88], *Kaufman* [R. 112], *Lipson* (Colo.) [R. 160], *Rhodes* [R. 166], *Rankin* [R. 173], *Kallenbaugh* [R. 179], *Frickel* [R. 234], *Rachford* [R. 255], *Munch* [R. 261], *Hight* [R. 268], *Parsons* [R. 274].

ages alone, where the trial Court's decision was free from error on the issue of liability, but that in that particular case the two issues were so interwoven that a new trial on all issues was necessary.

Rather than conflict with *Gasoline Products,* it appears to us that the Court of Appeals' opinion is entirely in accord with that case. In both cases the respective Courts find that under the particular circumstances of each case separate trials would not be fair. The only difference which we can see is that in *Gasoline Products* the Supreme Court said that there was no constitutional prohibition to a new trial on damages alone, while in the present case the Court of Appeals expressly avoided a decision on United's contention that it was unconstitutional—or at least presented a serious constitutional issue—whether such separate trials could be ordered at the outset of the litigation.

Petitioners purport to find a conflict with *Gasoline Products* in the finding of the Court of Appeals that in this particular case the issues of liability and damages are interwoven. Frankly we do not see how findings to the same effect, but arising from totally unrelated facts in two quite different types of litigation can be said to be conflicting.

Petitioners seem to feel that the opinion of the Court of Appeals is in conflict with *Gasoline Products* not because of what it says, but because of what the Court of Appeals would have said had the issue of exemplary damages not been before it. It seems hardly fair for Petitioners to claim that an opinion of the Court of Appeals conflicts with an opinion of the Supreme Court, because after the opinion is rendered Petitioners unilaterally purport to change the legal situation which was

before the Court of Appeals when it rendered its opinion. Further than that, however, Petitioners know that the fairness of separate trials, quite apart from the issue of exemplary damages, was extensively argued before the Court of Appeals, both orally and in briefs. The fact that the Court of Appeals chose to emphasize in its opinion the issue of exemplary damages certainly does not prove that the other matters before it were not considered and assessed by it. As the Petition shows (Pet. p. 5, Footnote 1), Petitioners tried to bargain with the Court of Appeals for an affirmance by offering to withdraw their claims for exemplary damages. This offer was repeated during oral argument before the Court of Appeals and in the Petition for Rehearing. Had the Court of Appeals felt that the withdrawal of exemplary damages could possibly change the posture of the case, surely there would have been some intimation to that effect from the Court, either during oral argument, in its opinion or by the granting of a rehearing.

III.

The Opinion of the Court of Appeals Does Not Conflict With Any Other Decision of Any Other Court of Appeals.

Petitioners' claim that the opinion of the Court of Appeals herein conflicts with a decision of the Court of Appeals for the Fifth Circuit in *Nettles v. General Accident F. & L. Ins. Co.*, 234 F. 2d 243. This is simply not so. In the *Nettles* case the District Court ordered a trial before a jury on the question of liability only. There is no intimation in the case that, had the jury found liability to exist, the District Court would have impaneled a different jury on the issue of damages.

After the issue of liability was submitted to the jury on interrogatories, the Court entered judgment on the verdict for defendants and ordered the actions dismissed.

It is obvious that the question of trying liability and damages to different juries never arose. There is no conflict.

IV.

The Court of Appeals Fairly Assessed the Circumstances in Connection With These Consolidated Actions and on the Basis of Its Assessment Correctly Decided That Separate Trials Before Different Juries Could Not Be Had Without Injustice.

A. Certiorari Should Not Be Granted Where the Court of Appeals Makes a Fair Assessment of the Record.

Although we submit that the opinion of the Court of Appeals was manifestly and demonstrably correct, certiorari should not be granted, even if this Court would have reached a different conclusion had it been in the place of the Court of Appeals.

National Labor Relations Board v. Pittsburgh S.S. Co., 340 U. S. 498, 503;

Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 491;

Federal Trade Commission v. Standard Oil Co., 355 U. S. 396, 400-401; and

Peurifoy v. Commission of Internal Revenue, 358 U. S. 59, 61.

B. The Decision Below Was Correct.

Petitioners do not even attack the correctness of the Court of Appeals' decision on the issue of exemplary damages.

Let us concede for the sake of argument that the hypothetical situation which Petitioners are trying to create by their waivers of exemplary damages really was before the Court of Appeals and let us examine the considerations of fairness and justice which impelled that Court to hold that in these particular cases a fair and just trial as to normal damages could not be had without injustice before a new jury.

Petitioners seem to assume that the question of the fairness of separate trials as to compensatory damages was not before the Court of Appeals and not considered by it. In fact it was extensively argued both orally and in briefs and on the basis of those arguments the Court of Appeals held that a trial as to normal damages could not be had without injustice before a new jury. Without repeating in great detail the arguments which we adduced in the Court of Appeals we would like to briefly summarize them, merely to show their nature and weight:

(1) These are not contract actions in which damages are more or less liquidated or can be impassionately calculated by resort to books of account, market values and the like. These are wrongful death cases in which the discretion of the jury in the assessment of damages is extremely broad and subject to very limited review. None can deny that in such cases the jury's discretion is more or less influenced by human emotions, known or suppressed. This human factor is necessarily present in every trial by jury and no one resents it. By the same token, however, it seems grossly unfair to stack the emotional cards in favor of one side. Take the present case: United is perfectly willing to have a jury which has heard all the evidence

assess damages against it. That is our traditional method of trying these cases. It is quite a different matter, however, to appear before a new jury, which knows nothing about the evidence on the liability issue, for "sentencing", so to speak. This new jury is simply told that United is responsible for the death of the plaintiff's father, mother, husband, wife or child. It knows nothing of the reasons for this liability. Whether exemplary damages are formally in issue is quite immaterial in such a situation. The dark suspicions of evil deeds and wanton neglect, unproven and unprovable, which will pervade the juror's minds will more than make up for the omission.

When we made these contentions before the Court of Appeals, we were not arguing in a vacuum. We directed the attention of the Court to two death cases which had been tried in the Southern District of California and in which notices of appeal to the same Court of Appeals had then been filed.* Both these cases arose out of another midair collision. A jury which had heard the evidence on liability, found liability to exist and thereafter awarded the plaintiffs $142,200.00 and $147,300 respectively. The District Court then granted motions for new trial on the issue of damages alone and when the cases were retried the verdicts increased to $315,000.00 and $425,000.00 respectively.

(2) Petitioners make certain arguments of convenience in their Petition. We do not say that all of these arguments are wholly invalid. We concede that the

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*_Anderson v. United Air Lines, Inc._, So. District of California, cause number 777-57 T;
Kehl v. United Air Lines, Inc., So. District of California, cause number 788-57 T.

service which a single jury would have to render would be relatively long, but we submit that it would not be unusually or excessively burdensome.

In the affidavit of Max F. Deutz, which is attached to the Petition, Mr. Deutz refers to the fact that 3,600 pages of depositions have been taken in these cases. We do not believe that the length of a trial can properly be measured by the curiosity and verbosity of counsel at deposition sessions.

We do not know how long this case will take to try. We believe Mr. Deutz's estimate is excessive, particularly in view of the fact that right at the present time strenuous efforts are being made to eliminate the necessity of proof as to many matters by an extensive pre-trial stipulation. Petitioners seem to feel that the total length of the trial with all issues tried to one jury may be as much as five months [Petition p. 12]. Perhaps so, but everyone knows that there have been many cases tried to juries which took much longer. The procedure suggested by United [Appendix A] would allow respites between the various verdicts and we are quite certain that somewhere in the Southern District of California the District Court will be able to find twelve jurors who are physically and mentally equipped for the task.

The fear of an undue burden on the jury is therefore, in our submission, unfounded.

On the other hand there are many reasons of convenience which must have appealed to the Court of

Appeals which dictate the retention of the same jury: An enormious amount of time will be saved in the selecting, questioning, 'challenging' and seating of one jury instead of twenty-four. Once the jury has been instructed on the law of damages under the Nevada Statutes, no repetition of the instructions will be necessary. Undoubtedly during their service they will gain a certain expertise in the assessment of damages. Much time will undoubtedly be saved just in the length of deliberations.

(3) There is also the point that if one jury, rather than twenty-three separate juries, assesses damages, all cases will be judged by the same yardstick and some of the plaintiffs will not be penalized by juries which are unduly niggardly in their verdict and United will not suffer from those which may be too generous.

(4) It is possible that some witnesses who may be called on the question of damages will also testify on the issue of liability. United raised this possibility in its opening brief in the Court of Appeals and Petitioners have never denied it. They have merely argued that United is not entitled to the fruits of impeachment on the liability issue, when the issue of damages is tried. We submit that United should not be deprived of the benefit of such impeachment and apparently the Court of Appeals agreed with us.

These then are the considerations which moved the Court of Appeals to hold that even as to normal damages justice demanded a trial of issues before the same

jury. We submit that these are valid considerations and that the Court of Appeals fairly and correctly assessed them.

V.
There Are No Valid Reasons for Granting the Writ.

The decision of the Court of Appeals is not in conflict with any decision of any other court of appeals; the Court of Appeals has not decided any important question of Federal law, but merely applied basic principles of fairness to the facts of this particular case; there is no conflict with any applicable decision of this Court and there has been no departure from the accepted and usual course of judicial proceedings. None of the reasons why a writ of certiorari should be granted are present.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RANSOM W. CHASE,
Attorney for Respondent.

HUGH B. ROTCHFORD,
OTTO M. KAUS,
Of Counsel.

APPENDIX "A."

Excerpt From Respondent's Brief Before United States Court of Appeals for the Ninth Circuit.

The issue before the Court is an exceedingly narrow one. We must emphasize at the outset that United (1) does not object to consolidation on the issue of liability; and (2) does not suggest that on the issue of damages all cases be submitted to the jury together with the issue of liability; and (3) does not suggest that all cases should be submitted to the jury on the issue of damages at the same time. We feel that to take any other position would be to encourage needless delay and waste of time on the one hand and to require impossible feats of memory by the jury on the other. The procedure which we suggest and which would at the same time be in accordance with the Seventh Amendment to the Constitution, the correct interpretation of F. R. C. P. 42(b), simple fairness, the convenience of litigants, attorneys and the Court, which would save time and take the frailties of human memory into account is this: That a jury be empanelled with alternate jurors; that the issue of liability be tried to that jury and a special verdict rendered thereon; that thereafter if the jury should find against United the various plaintiffs, in whatever order is convenient to the Court and counsel, present their cases on damages, one after the other, and that the jury return verdicts after each case is heard. If it appears desirable certain groups of cases can be tried together on the issue of damages. We would be willing

to stipulate that in the case of a juror becoming sick or otherwise unable to continue, an alternative juror may pass on damages, although as an alternate he was not called upon to vote on the issue of liability.

The issue, therefore, narrows down to this: Is it practicable, constitutional, proper under F. R. C. P. 42(b), fair to litigants or convenient to the Court to provide in advance of any trial that jurors who have not heard the evidence on the issue of liability, shall assess the amount of damages.

APPENDIX "B."

California Probate Code, Section 578a.

"Compromise, etc., claims and rights of action for death or injury: Procedure. An executor or administrator shall have power, with approval of the court which ordered his appointment, to compromise and settle all claims or rights of action given to him by any law for the wrongful death or injury of his decedent, including any action brought by him in attempting enforcement thereof. Such power shall include the giving of a covenant not to sue.

To obtain such approval or authorization, the executor or administrator shall file a verified petition with the clerk showing the amount of money proposed to be paid. The clerk shall set the petition for hearing by the court and give notice thereof by causing a notice to be posed at the courthouse of the county where the petition is filed. Such notice must be given at least 10 days before the hearing. The clerk shall also cause notice to be mailed, postage prepaid, to the heirs of the decedent as named in the petition for letters of administration or letters testamentary, at least 10 days before the hearing, addressed to them at their respective post-office addresses as set forth in said petition. [Added by Stats. 1947, ch. 527, §1.]"

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 923

PETITIONERS' REPLY BRIEF

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IN THE

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OCTOBER TERM, 1960

No. 923

JANICE WIENER, as Executrix of the Estate of Norton Wiener, Deceased, and Related Cases,

Petitioners,

vs.

UNITED AIR LINES, INC.

PETITIONERS' REPLY BRIEF.

Petitioners' Reply to Respondent's Argument.

Respondent's brief in opposition overlooks the principal vice of the opinion of the court of appeals. That opinion establishes as the law of the case that even the issue of normal compensatory damages cannot be tried separately from the issue of liability. No discretion is left to the district court in its conduct of the trial proceedings in these cases.

Respondent does not contend that the evidence relating to liability should affect in any way the amount of compensatory damages awarded. It merely speculates that the jury is more likely to render a verdict unfair to respondent if there are separate trials. This assumes that juries will not follow instructions with respect to the measure of compensatory damages, an as-

sumption based solely upon the bar assertion of the respondent.* If respondent's real concern is that a fair verdict on the issue of damages result, it would seem that reliance should be placed upon the trial court's exercise of its control over excessive or insufficient verdicts rather than to insist that one jury rather than two try the entire case.

Respondent contends that exemplary damages have not been effectively waived, relying upon the case of *Berry v. Chaplin,* 47 Cal. App. 2d 652, 169 P. 2d 442. In that case the court held that an agreement to dismiss a claim for child support in the event of an unfavorable blood test was not binding on the minor plaintiff. The *Berry* case is inapplicable. It is one thing for counsel to agree to give up the rights of a minor as was done in the *Berry* case; it is quite another for attorneys to decide that as part of their trial procedure and tactics it is to the advantage of the minor to have certain claims for damages pressed and others foregone. The first is a surrender of rights; the second involves judgment as to the best means of securing them. Certainly if counsel are of the opinion that a demand for exemplary damages may weaken their stand with respect to compensatory damages, it is not only their right but their duty to limit their claims to compensatory damages. This decision is as much within the perogative of counsel as specifying, and thereby nec-

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*Respondent cites two cases in which a retrial on the issue of damages alone resulted in substantial increases in the verdicts over the amounts awarded by a jury which had also heard the evidence of liability. (Brief in Opposition, p. 11.) These examples, rather than supporting respondent's position, would seem to support petitioners. The verdicts of the first jury were so low that a new trial was necessary on the issue of damages alone.

essarily limiting, the amount of the claim in the prayer of the complaint.

Respondent's argument that California Probate Code Section 578a requires court approval to insure effectiveness of the plaintiffs' statements limiting damages overlooks the express provisions of that section. Even if this code section were applicable, Respondent's argument concerning the binding effect upon minor heirs of the statements limiting damages is properly directed to the trial court. The decision of the court of appeals would deprive the trial court of the power to make any order respecting the limitation of damages that it might deem appropriate as a condition of separate trials on the issues of liability and compensatory damages.

As a consequence of its erroneous holding that in this case liability and normal compensatory damages cannot be fairly tried separately, the court of appeals appropriated to itself the exercise of discretion as to the best procedure for the trial of these cases, a discretion with which the trial court is properly vested.

Conclusion.

By reason of the foregoing, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK B. BELCHER,
BEN MARGOLIS,
WILLIAM A. NORRIS,
Attorneys for Petitioners.